2015 IL App (4th) 140388WC-U

Order filed April 29, 2015

IN THE

APPELLATE COURT OF ILLINOIS

FOURTH DISTRICT

J-SQUARED MASONRY,	)	Appeal from the Circuit Court
	)	of McLean County, Illinois.
Plaintiff-Appellant,	)	
	)	
	)	
v.	)	Appeal No. 4-14-0388WC
	)	Circuit No. 13-MR-293
ILLINOIS WORKERS' COMPENSATION	)	
COMMISSION, *et al.*, (Anthony Pagoria,	)	Honorable
Defendant-Appellee).	)	Rebecca Simmons Foley,
	)	Judge, Presiding.

PRESIDING JUSTICE HOLDRIDGE delivered the judgment of the court.
Justices Hoffman, Hudson, Stewart, and Harris concurred in the judgment.

ORDER

¶ 1 *Held*: The Commission's award of a wage-differential benefit was not against the manifest weight of the evidence.

¶ 2 The claimant, Anthony Pagoria, filed an application for adjustment of claim under the Workers' Compensation Act (Act) (820 ILCS 305/1 *et seq.* (West 2006)), seeking benefits for injuries to his left arm and other parts of his body allegedly sustained while working for J-Squared Masonry (employer) on November 15, 2007. The employer stipulated to accident and notice. A section 19(b) hearing was held on October 14, 2011, before Arbitrator Stephen Mathis.

In an award entered on June 4, 2012, the arbitrator found that the claimant's current condition of ill-being was causally related to the November 15, 2007, accident. The arbitrator thereby awarded temporary total disability (TTD) disability benefits of $971.47 per week for 46 weeks (November 19, 2007, through October 5, 2008), and 13 weeks of maintenance benefits (September 1, 2009, through November 30, 2009). The arbitrator further awarded permanent partial disability (PPD) benefits of $570.13 per week as a wage differential commencing on December 1, 2009, pursuant to section 8(d)(1) of the Act. 820 ILCS 305/8(d)(1) (West 2006). The employer sought review before the Illinois Workers' Compensation Commission (Commission), which affirmed and adopted the arbitrator's award. The employer then sought judicial review of the Commission's decision in the circuit court of McLean County, which confirmed the decision of the Commission. The employer then filed a timely appeal with this court, maintaining that the Commission's finding of causation and award of TTD and PTD benefits were against the manifest weight of the evidence.

¶ 3 FACTS

¶ 4 On November 17, 2007, the claimant suffered an undisputed workplace injury to his upper left arm while working as a bricklayer for the employer. Prior to the accident, the claimant, who was 27 years old at the time, had worked for the employer in that capacity for approximately two years. He had been a member of the bricklayers union since 1999, having completed a six-month union training program followed by a three-year apprenticeship. The claimant testified that, as a bricklayer, he would have to routinely lift heavy bricks, most weighing 40 to 50 pounds, some weighing more. He would also have to help lift I-beams, and most of the lifting had to be done on his own without assistance.

¶ 5 The claimant testified that at the time of the accident he was working for the employer at a job site constructing an addition to a hospital. He was saw-cutting single bricks using a saw

with a 14 to 16 inch blade wheel. He testified that, on occasion, the blade would catch or snag on the brick while he was cutting it. The claimant testified that he worked an entire morning on the saw, and by lunch break his left arm "was really hurting" and by the end of the day the claimant could barely move his left arm.

¶ 6 The following day, a Friday, the claimant reported for work at a different job site. He reported to his foreman that he had hurt his arm on the job the day before. He requested that he be given work for the day that did not involve lifting blocks or bricks. The claimant testified that the foreman gave him light-duty sweeping work to perform that day. According to the claimant, he was not scheduled to work over the ensuing weekend.

¶ 7 On Monday, November 19, 2007, the claimant sought treatment from Dr. Paul Perona at St. Mary's Hospital in Spring Valley, Illinois. He filled out a patient questionnaire stating that he developed left arm pain at work and his condition had been ongoing for four days. Dr. Perona made an initial diagnosis of possible rotator cuff tendon tear and ordered an MRI. He also ordered the claimant off work pending further diagnostics.

¶ 8 On December 6, 2007, the claimant returned to Dr. Perona, who had reviewed that MRI results as negative for rotator cuff tendon tear. Dr. Perona diagnosed left shoulder instability and prescribed physical therapy. He ordered the claimant off work from bricklaying duties, although he did not rule out light-duty if any were available. On December 19, 2007, the claimant began physical therapy at Rush Copley Medical Center.

¶ 9 On January 17, 2008, the claimant returned to Dr. Perona for a follow up consultation. Dr. Perona noted some improvement after physical therapy, but also noted continued weakness in the claimant's left shoulder. He continued his diagnosis of left shoulder instability along with a possible neck instability as well. He requested an MRI of the cervical spine and an EMG/NCV of the entire left upper extremity. Additionally, he ordered the claimant to continue with

physical therapy at Rush Copley and continued his recommendation that the claimant not return to bricklaying until further notice.

¶ 10 On January 26, 2008, the claimant underwent a cervical MRI. On February 14, 2008, the EMG/NCV tests were performed. Initial results of MRI revealed disc bulging at C3-C4 and C5-C6. The EMG/NCV was administered by Dr. Angela Benavides, who read the test results as showing a possible upper brachial plexus injury.

¶ 11 On March 6, 2008, Dr. Perona reviewed the tests and diagnosed brachial plexopathy. He recommended an MRI of the brachial plexus. Dr. Perona again continued physical therapy and the previous work restrictions. The brachial plexus MRI was performed on March 17, 2008.

¶ 12 On April 22, 2008, Dr. Perona reviewed the latest MRI results and noted evidence of a suprascapular nerve injury. He maintained his previous diagnosis of left upper extremity brachial plexopathy. He continued physical therapy and the claimant's work restrictions.

¶ 13 On May 20, 2008, the claimant was again examined by Dr. Perona, who noted only "very slight improvement" of the claimant's condition. He recommended the claimant continue with physical therapy and begin a course of work hardening. He also continued the claimant's work restrictions. On June 4, 2008, the claimant moved his physical therapy to St. Margaret Hospital. On June 17, 2008, the claimant had a brief follow up with Dr. Perona, who noted "some improvement" in the claimant's left shoulder. Dr. Perona recommended continued physical therapy and work hardening, a repeat EMG/NCV, and a Functional Capacity Evaluation (FCE). Dr. Perona wrote in his treatment notes: "Hopefully, after the functional capacity exam, we should be able to come up with a plan for him to return to work with restrictions."

¶ 14 On July 7, 2008, a new EMG/NCV was performed by Dr. Benavides, who reported some improvement in comparison to the previous test. On July 17, 2008, the claimant reported to Dr.

Perona that he experienced an increase in pain in the left shoulder following the previous physical therapy session.

¶ 15 On September 10, 2008, an FCE was performed at St. Margaret Center for Physical Rehabilitation by Lanny Slevin, who reported that the claimant gave a consistent and valid effort. The FCE written report indicated that no job site analysis was performed and that all the information regarding the claimant's former job duties was obtained from the claimant. The report noted that there was a 60 pound lifting requirement. Based upon the claimant's description of his job duties, Slevin wrote that the claimant met or exceeded the reported job duties, although there was a notation that the claimant's left arm "tires fairly easily."

¶ 16 On September 11, 2008, the claimant was examined at the request Dr. Perona by Dr. Guido Marra, a board certified orthopedic surgeon. Dr. Marra diagnosed the claimant with a "resolving traction injury to his brachial plexus." He opined that the claimant was not in need of any further treatment, but he should continue a home strengthening program. He also opined that the claimant might have "some residual deficits." He referred the claimant back to Dr. Perona for continued evaluation.

¶ 17 On September 30, 2008, the claimant was again examined by Dr. Perona, who observed continuing left shoulder pain and left shoulder brachia plexography. Dr. Perona opined, based upon his evaluation and the FCE results, that the claimant had reached maximum medical improvement (MMI) and could return to his regular duties on October 6, 2008. Dr. Perona opined that even after the claimant returned to work, he might need strength training and medical follow-ups on an as needed basis. On the return to work form, Dr. Perona checked a box labeled "undetermined" as to whether claimant would have any permanent restrictions.

¶ 18 The claimant testified that, after he received his return to work authorization from Dr. Perona, he tried on several occasions to call the employer, but his calls were not returned. The

claimant testified that when he did not hear back from the employer during the remaining days of 2008, he looked for jobs in the paper and actively sought employment elsewhere.

¶ 19 On August 26, 2009, the claimant was examined at the request of the employer by Dr. Robert Eilers, a board certified physical medicine and rehabilitation specialist, who testified by evidence deposition given on June 10, 2010. Dr. Eilers reviewed the claimant's medical reports and conducted his own physical examination of the claimant. Dr. Eilers opined that the claimant would be unable to return to work as an unrestricted bricklayer. He initially placed the claimant at a medium level of work.

¶ 20 On November 17, 2009, following a second examination of the claimant, Dr. Eilers suggested a new FCE, which was performed on November 30, 2009, at Illinois Valley Community Hospital by Donald Fruendt. The test was considered to be valid by Fruendt, who reported that the claimant's physical abilities were considered to be close to those required in his prior job as a bricklayer, but the claimant did not meet those requirements. Fruendt opined that, with further work hardening, the claimant might be able to meet the physical requirements necessary for a bricklayer. Fruendt wrote in a letter to the claimant's attorney that the claimant's limitation included a 40 pound lifting restriction, which was not up to the requirements of a bricklayer.

¶ 21 Based upon the FCE report prepared by Fruendt, Dr. Eilers again opined that the claimant could not return to work as a bricklayer and was relegated to, at best, some medium work. In his evidence deposition, Dr. Eilers opined that the claimant's current condition of ill-being was causally related to his injury on November 15, 2007. Under questioning by the claimant's attorney, Dr. Eilers observed that the claimant's symptoms were "not something he can control or manipulate." Dr. Eilers further observed that the claimant "doesn't have the ability to return [to] doing what he did in a realistic fashion over time." He noted that the claimant's deficits "are

permanent." Dr. Eilers also noted that Dr. Perona's original release note used the word "undetermined" to describe whether the claimant would have any permanent restrictions.

¶ 22 The record established that the claimant worked in 2009 for River City Construction, earning $473.92 in wages and for Palos Masonry for wages of $3,090.90. Claimant testified that he did no heavy lifting on these jobs. The record further established that the claimant requested vocational assistance from the employer on or about August 31, 2009. A letter from the employer to the claimant dated October 6, 2009, stated that the employer was still investigating its responsibility to provide vocational assistance. There is no evidence that the claimant was ever offered vocation rehabilitation or assistance by the employer.

¶ 23 On December 1, 2009, the clamant began working at Wal-Mart as an "unloader" at a wage of $15.65 per hour. The claimant testified that by that date he had stopped looking for bricklayer work when he realized that there were no bricklayer jobs within his work restrictions. On his employment application at Wal-Mart, the claimant indicated that his employment with the employer and Palos Masonry had ended due to "lack of work."

¶ 24 On January 14, 2010, the claimant wrote a letter to Ed Tegland, president of Bricklayers Union Local 6, stating that he no longer wished to be considered for bricklayer employment due to the poor economy and the lack of jobs for bricklayers. The claimant made no mention in his letter to Tegland about the work restrictions that prevented him from meeting the physical requirements of the position. The claimant testified that he did not believe he needed to tell Tegland about his medical condition.

¶ 25 On June 28, 2010, the claimant was examined at the request of the employer by Dr. Marc J. Breslow, a board certified orthopedic surgeon. Dr. Breslow reviewed the claimant's medical documentation and performed a physical examination. Initially, Dr. Breslow recommended another FCE, and opined that if limitations were found in the new FCE, those limitations would

be permanent. In an addendum report issued December 8, 2010, Dr. Breslow noted that the claimant had declined to participate in a third FCE, therefore it was his opinion that the claimant was capable of returning to unrestricted duty as a bricklayer.

¶ 26 On June 29, 2010, the claimant returned to Dr. Perona for further evaluation. Dr. Perona noted that the claimant had been working at Wal-Mart for about six months prior to the examination with no apparent injuries to the claimant's left shoulder. Dr. Perona opined that the claimant's diagnosis of left shoulder pain and brachial plexopathy remained unchanged as did the previously imposed work restrictions.

¶ 27 Edward Pagella, a certified rehabilitation specialist, testified that he performed an evaluation of the claimant's work abilities on June 2, 2010. Pagella testified that, under both the original FCE, performed by Mr. Slevin and the second FCE performed by Mr. Fruendt, the claimant fell below the physical requirements for a bricklayer. Pagella opined that the claimant was unable to return to work in his original occupation as a bricklayer due to his continuing physical restrictions. He further opined that, even though the claimant's job duties at Wal-Mart might occasionally require lifting beyond the claimant's restrictions, those occasions were infrequent and the Wal-Mart job was an excellent job for the claimant due to its relatively high wage of $16.50 per hour. Pagella further opined that vocational assistance might be able to increase the claimant's earning power over time, but without such assistance the claimant had reached his best earning potential at Wal-Mart.

¶ 28 Jodee Benoit, a field representative of the Bricklayers Union Local 6, testified as a witness for the claimant. Benoit testified that he was familiar with the pay scale for Local 6 as well as for locals in surrounding areas. He verified that the claimant's last pay check from the employer, which showed 40 hours at $36.43 per hour, was the going rate at the time. He also testified that, on the date of the hearing, the rate had increased to $40.03 per hour. He further

testified that a typical work week for a bricklayer was 40 hours, that a bricklayer would be expected to be available for the entire 40 hours, and that the only reason a bricklayer would work less than 40 hours in a given week would be due to inclement weather. Benoit further testified that a bricklayer would not be able to work with any weight or lifting restrictions, and that any individual with a 40 pound lifting restriction would not be able to work as a bricklayer.

¶ 29 Benoit also testified that he had a conversation with the claimant regarding terminating his membership in the local. He recalled that the claimant did not wish to pay dues any longer, although he did not say that it was because he could no longer work due to work restrictions. Benoit stated that when a member seeks to resign, he does not expect them to indicate whether they have a medical condition.

¶ 30 The claimant testified at the hearing that he was still working for Wal-Mart. He offered as an exhibit in evidence a document he received when he was hired at Wal-Mart that indicated that his maximum attainable hourly rate in the unloader position was $18.65 per hour. He described his job duties at Wal-Mart as occasionally lifting boxes that might weigh as much as 40 or 50 pounds. He acknowledged that he might occasionally exceed the 40 pound lifting limitation that prevented his employment as a bricklayer. He observed, however, that unlike as a bricklayer, the heavy lifting as an unloader was only occasional as compared to the constant lifting requirements of a bricklayer. He also observed that the Wal-Mart job was the best he could find outside of bricklaying. The claimant also testified that he has difficulty performing tasks such as lawn mowing and shoveling snow. He reported pain in the left arm and shoulder whenever he holds his arm over his shoulder for more than a few minutes. He testified that he had no such symptoms prior to the accident and his condition has not improved.

¶ 31 The claimant offered in evidence his last paycheck from the employer which indicated a rate of pay of $36.43 per hour. He testified that his expected work week at the time for 40 hours

per week. On occasion, due to inclement weather, he might not work 40 hours in a given week. However, he was expected to be available for 40 hours every week.

¶ 32 The arbitrator found that the claimant's current condition of ill-being was causally related to the accident on November 15, 2007. He noted that Drs. Perona, Eilers and the employer's own examiner, Dr. Breslow, all found the claimant's current condition to be causally related to the accident. The arbitrator credited the claimant's testimony that his physical condition at the time of the hearing was essentially unchanged since the accident. In addition, the arbitrator noted that the claimant had undergone two valid FCEs which found that the claimant had permanent restrictions that prohibited him from returning to his former occupation as a bricklayer. The arbitrator ordered TTD benefits to be paid until October 6, 2006, the date upon which Dr. Perona opined that the claimant had reached MMI. The arbitrator also ordered the employer to pay maintenance benefits from September 1, 2009 (the date upon which the claimant requested vocational assistance) through December 1, 2009 (the date the claimant began employment at Wal-Mart). The arbitrator calculated the claimant's average weekly wage at the time of the accident to be $1,457.20.

¶ 33 The arbitrator further found that the claimant was entitled to a wage differential award under section 8(d)(1) of the Act. 820 ILCS 305/8(d)(1) (West 2006). The arbitrator found that the claimant had suffered a partial incapacity as a result of the November 15, 2007, accident that prevented him from pursuing his usual and customary line of employment as a bricklayer. In doing so, the arbitrator gave greater weight to the conclusions reached by Dr. Eilers and Mr. Pagella that the claimant could no longer perform the physical requirements of that occupation. The arbitrator further noted that each of the two FCEs established that the claimant could not meet the physical requirements of the bricklayer occupation. The arbitrator rejected Dr. Breslow's opinion that the claimant could return to the occupation of bricklayer as being based

only on the claimant's decision not to undergo a third FCE. In addition, the arbitrator gave significant weight to Benoit's testimony that no one with a 40-pound permanent lifting restriction, such as the claimant's, would ever be able to perform as a bricklayer. The arbitrator gave no weight to the fact that Dr. Perona released the claimant to work for an "undetermined" duration, nor did he place much significance on the fact that the claimant did not give medical reason for withdrawing from the union.

¶ 34 The arbitrator also found that the claimant had established by the preponderance of the evidence that he had suffered an impairment of his earnings as a result of the November 15, 2007, accident. The arbitrator found that if the claimant were still employed as a bricklayer his earning potential would be $40.03 per hour for a 40 hour week, for a total weekly earnings of $1601.20. He further found that the claimant's current employment at Wal-Mart was an appropriate level of employment for the claimant and noted that the anticipated top wage of $18.65 per hour for a 40 hour work week would give the claimant a maximum earning potential of $746 per week. The arbitrator then calculated the wage differential benefit at $570.13 per week.

¶ 35 The employer sought review of the arbitrator's award by the Commission, which unanimously affirmed and adopted the award. The employer then sought judicial review of the Commission's decision in the circuit court of McLean County which confirmed the decision of the Commission. The employer now appeals.

¶ 36 ANALYSIS

¶ 37 The employer's only issue on appeal is the contention that the Commission erred in awarding the claimant a wage differential benefit pursuant to section 8(d)(1) of the Act. 820 ILCS 305/8(d)(1) (West 2006). To receive a wage differential award "an injured worker must prove (1) that he or she is partially incapacitated from pursuing his or her usual and customary

line of employment and (2) that he or she has suffered an impairment in the wages he or she earns or is able to earn." *Cassens Transport Co. v. Industrial Comm'n*, 218 Ill. 2d 519, 530-31 (2006). Whether a claimant has shown his entitlement to a wage-differential award is a question of fact for the Commission, whose decision will not be disturbed on review unless it is against the manifest weight of the evidence. *Copperweld Tubing Products, Co. v. Illinois Workers' Compensation Comm'n*, 402 Ill. App. 3d 630, 633 (2010).

¶ 38 Here, the Commission found that the claimant had established the two prongs of a wage differential claim. It noted that the medical opinion testimony and the vocational expert testimony showed that the claimant was no longer able to pursue his usual and customary line of employment as a bricklayer. The evidence established that the claimant had permanent physical restrictions and that those restrictions would prevent anyone from working as a bricklayer. While the employer argues that the restrictions did not prevent the claimant from returning to his former occupation as a bricklayer and he merely chose not to return to bricklaying due to the economy, the Commission rejected that interpretation of the evidence. We find that the evidence relied upon by the Commission supports its conclusion that the claimant was no longer able to pursue his usual and customary line of employment.

¶ 39 The Commission's finding that the claimant met the second part of the wage differential test, *i.e.*, that he suffered an impairment of his wage earning potential, was also supported by the manifest weight of the evidence. The record supported the Commission's finding that the claimant's current job at Wal-Mart was in all probability the best earning opportunity for the claimant. The record also established the difference in earning potential between the claimant's former occupation as a bricklayer and his current earning potential. Given the extensive evidence on the question of the claimant's earning potential before and after the accident, it

cannot be said that the Commission's finding that the claimant established his entitlement to a wage differential was against the manifest weight of the evidence.

¶ 40 CONCLUSION

¶ 41 We affirm the judgment of the circuit court which confirmed the decision of the Commission.

¶ 42 Affirmed.